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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-507

WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, REED ENTERPRISES, INC., DAVID L. THOMAS, and LIBRARY SERVICE, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR REHEARING.

The petitioners respectfully present this petition for a rehearing, based upon the grounds which follow hereinafter.

A.

1. There is no dispute that the prosecution and convictions of the petitioners here took place before this Court's decision in *Miller v. California,* 413 U.S.15, and the related cases. The government, in its brief and argument, conceded that petitioners had been "caught in a period of transition". *United States v. Palladino,* 490 F.2d 499, 500 (1 Cir. 1974). Petitioners were "convicted in what may be called a no man's land". *United States v. New Orleans Bookmart, Inc.,*

et al., 490 F.2d 73, 75 (5 Cir. 1974). Indeed, the majority opinion in this case states: "The principal question presented by this case is what rules of law shall govern obscenity convictions had prior to the date on which this Court's decision in *Miller v. California, supra,* and its companion cases were handed down, but which had not at that point become final." [Slip Op. 8].

A sharply divided Court has affirmed judgments of conviction which include sentences of imprisonment of four years and three years. The majority opinion states that while the *Miller* holdings rejected the view that the First Amendment requires that the proscription of obscenity be based on uniform nationwide standards of what is obscene, such standards being described as "hypothetical and unascertainable" [Slip Op. 14], still, the contention that prior convictions thereunder were rendered constitutionally impermissible was evidence of "a misunderstanding" of the *Miller* holdings [Slip Op. 14]. It is also plain from the majority opinion that 18 U.S.C. §1461 has never contained in its language the specific types of sexual conduct referred to in *Miller* and, indeed, the majority opinion for the first time purports to read the specific language into the federal statute [Slip Op. 24]. It is argued, however, that petitioners cannot complain with respect to the vagueness and overbreadth of the federal obscenity statute prior to *Miller* because the law had been "authoritatively construed" in *Manual Enterprises, Inc. v. Day,* 370 U.S.478 (1962), although the language quoted from the *Manual* opinion contains none of the specific sexual conduct described in *Miller,* and the *Manual* judgment itself upheld the nonobscenity of the material involved. 370 U.S. at 489-490 and

n.13. Finally, although *Miller* described the "utterly without redeeming social value" test as "unworkable", and rejected as a constitutional standard the "ambiguous" concept of "social importance", the majority opinion in this case concludes that *Miller* did not hold the third part of the *Memoirs* test to be unconstitutionally vague, but only a "departure from the definition of obscenity in *Roth*" [Slip Op. 26].

If a trial in a federal prosecution in a federal court depends on proof beyond a reasonable doubt of the essential elements of an offense, which elements are described by the highest court of the land as "hypothetical", "unascertainable", "abstract", "unrealistic", an "exercise in futility", "unworkable", "ambiguous" and without "any meaning at all", then, with all due deference, if the judgments of conviction rendered thereunder are not unconstitutional, they at least plainly do not satisfy the appearance of justice. In addition, when the record upon which the judgments of conviction rest are concededly marked by a cumulation of errors, and when three Justices of the Supreme Court of the United States (and probably a fourth who did not reach the issue) state that at least some of these errors constituted a denial of due process of law in the most fundamental sense, then "fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted". *Communist Party v. S.A.C.B.*, 351 U.S.115, 124.

2. This Court has the responsibility to supervise the administration of criminal justice by the federal judiciary. This includes the duty to see that the laws

are enforced by fair proceedings. The petitioners invoke this supervisory jurisdiction in the case herein. As was stated in *McNabb v. United States,* 318 U.S. 332, 340-341:

> ". . . the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reasons which are summarized as 'due process of law' and below which we reach what is really trial by force . . . Considerations of large policy in making the necessary accommodations in our federal system are wholly irrelevant to the formulation and application of proper standards for the enforcement of the federal criminal law in the federal courts."

See also, *Saldana v. United States,* 365 U.S.646, 647 (sentence "not consistent with that regularity and fairness which should characterize the administration of criminal justice in the federal courts"); *Elkins v. United States,* 364 U.S.206, 216 (silver platter doctrine abandoned upon invocation of "the Court's supervisory power over the administration of criminal justice in the federal courts"); *Marshall v. United States,* 360 U.S.310, 313 (exposure of jurors during trial to newspaper articles entitles accused to a new trial "in the exercise of our supervisory power to formulate and apply proper standards for enforcement of the

criminal law in the federal courts"); *Yates v. United States*, 356 U.S.363, 366-367 (sentence of district court in contempt action set aside in the exercise of the Supreme Court's "supervisory power over the administration of justice in the lower federal courts"); *Grunewald v. United States*, 353 U.S.391, 423-424 (danger that jury might make impermissible use of an alleged prior inconsistent statement admitted into evidence on the question of credibility justifies grant of a new trial under "our supervisory power over the administration of federal criminal justice"); *McCarthy v. United States*, 394 U.S.459, 464 (failure by the district judge to comply with F.R.Cr.P., Rule 11, results in reversal and remand "pursuant to our supervisory power over the lower federal courts"); *Offutt v. United States*, 348 U.S.11, 14 ("Therefore, justice must satisfy the appearance of justice.").

In the discussion which follows, petitioners do not retrace constitutional and legal arguments presented in their briefs and argument to this Court. Petitioners do earnestly urge each Justice of the Court who joined in the majority opinion to reconsider the ruling in the light of the fundamental principles of fairness in the administration of justice in the federal courts which the Court itself has unequivocally enunciated in the past. In invoking the supervisory jurisdiction of this Court, the petitioners bleieve that an analysis of the majority opinion will reveal a need for a modification of the judgment of affirmance to one of reversal and remand. Petitioners' sole request is the opportunity for a trial before a jury of their peers based upon fair and delineated standards of law and procedure, devoid of the tangled and complex issues which arose in the transition from *Memoirs* to *Miller* to *Hamling*.

3. The majority opinion concludes that while the trial court's erroneous instructions referred only to national standards, still the convictions of petitioners were not rendered void as a matter of constitutional law. "Whether petitioners were materially prejudiced by those references is a different question." [Slip. Op. 17]. Before discussing the question of "harmless error" thus projected by the opinion, petitioners submit that the majority opinion overlooks the significance of the record in this respect. The issue presented to the Court involves not only instructions by the trial judge, but the nature of the specific charge made against these petitioners in the indictment and the entire theory of the case which was the sole focus of the evidence presented by the government and petitioners, and emphasized and re-emphasized by the trial judge to the jury.

Prior to trial, on a motion for a bill of particulars which requested the government to state what the petitioners were charged with under the word "obscene" in the indictment (J.A. 35-58), the government replied: "Insofar as Counts 2 through 14 are concerned, implicit in an allegation of obscenity as to the advertisements named therein is the allegation that said advertisements go substantially beyond customary limits of candor in the nation as a whole, in the description or representation of matters pertaining to sex, nudity or excretion." (J.A. 46). There can be no doubt that the petitioners here were charged by the indictment, as amplified by the bill of particulars, with mailing a brochure which violated the standards of the nation as a whole, yet their convictions have been affirmed on the basis that the brochure offended the standards of the judicial district in the Southern District of California, a legal standard which was not in existence at

the time petitioners were tried and which was never given to the jury as the applicable law. Plainly, such a result is contrary to principles enunciated by this Court in *Rabe v. Washington*, 405 U.S.313; *DeJonge v. Oregon*, 299 U.S.353; and *Cole v. Arkansas*, 333 U.S. 196.

Mr. Justice Brennan, in his dissenting opinion, has demonstrated the insistence by the trial judge that the case be tried solely on the basis of national standards [Slip Op. 5-7, n.3]. The question here, therefore, is not whether jury instructions are to be "judged as a whole, rather than by picking isolated phrases from them" [Slip Op. 17]. Taking the instructions as a whole and reading every word of the instructions from beginning to end, there is never a doubt that the jury was told to consider the evidence only with respect to the standards of the nation as a whole. Nevertheless, the majority opinion holds that reversal is required only where there is a probability that "the excision" of the instructions with respect to national standards would have "materially affected the deliberations of the jury" [Slip. Op. 18]. If the instructions with respect to national standards are "excised", the error would be palpable because there would be no instructions to the jury on community standards at all. This is not a case where the trial judge instructed on both national and local standards and where it is contended that the jury might have selected national instead of local standards. This is a case where the jury was *never* instructed that the standards for judging the alleged obscenity of the brochure were the standards of San Diego alone.

The majority opinion concludes that the petitioners were not "materially prejudiced". This conclusion is not reached by asserting that the jury was ever in-

structed on the appropriate community standards, but primarily on the basis of a "judicial hunch" that the jury would have reached the same result even if a proper instruction had been given.[1] The record, however, does not support such conclusion, and common experience to which trial judges and trial lawyers can testify also belies such conclusion. The survey which the trial judge excluded from evidence demonstrated that a majority of the persons interviewed in San Diego expressed the view that the brochure should be generally available to the public. Wholly apart from questions of admissibility and weight to be given to this evidence which was excluded, how can it be said that the jury would have reached the same result when there was oral and documentary evidence available, which if believed by the jury, would have resulted in a verdict of not guilty.[2]

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[1]If the distinctions between national standards and other types of standards are "confusing and often gossamer" [Slip Op. 19], then all the more reason for instructions to the jury to be precise as to what is meant by "community standards". The references to some argument of counsel in urging the admission of the San Diego survey and to the statements of one of the petitioners' expert witnesses [Slip Op. 19-20] only indicate that the focus was at all times on "national standards", and as the record makes amply clear, the trial judge rejected petitioners' efforts to present evidence or to even permit the testimony of witnesses for petitioners with respect to the standards of that judicial district.

[2]The majority's attempt to distinguish *Saunders v. Shaw*, 244 U.S.13, appears to misconceive the real issue here. In *Saunders*, this Court reversed the judgment to provide the intervening defendant in that case "an opportunity to controvert the plaintiff's proof" [Slip Op. 20, n. 11]. The majority states that petitioners were given full latitude "in rebutting every factual issue dealt with in the government's case" (*Ibid.*). Keeping in mind, however, that these petitioners are entitled to all the benefits of *Miller* if *ex post facto* considerations are to be avoided, it should be noted that the government never introduced any evidence with respect to the standards of San Diego and petitioners, therefore,

More importantly, petitioners submit that the conclusion drawn that petitioners were not materially prejudiced, because in the opinion of a majority of this Court the jury would have reached the same result, not only does violence to substantial principles of law enunciated by this very Court in the past, but essentially deprives petitioners of the right to a fair trial by a jury. Mr. Justice Frankfurter stated in *Bollenbach v. United States,* 326 U.S.607, 613:

> ". . . The Government's suggestion really implies that, although it is the judge's special business to guide the jury by appropriate legal criteria through the maze of facts before it, we can say that the lay jury will know enough to disregard the judge's bad law if in fact he misguides them. *To do so would transfer to the jury the judge's function in giving the law and transfer to the appellate court the jury's function of measuring the evidence by appropriate legal yardsticks.*" (Emphasis added).

See, *Yates v. United States,* 354 U.S.298, 327 ("We cannot allow a conviction to stand on such an 'equivocal direction to the jury on a basic issue'."); *Wilson v. United States,* 250 F.2d 312, 325 (9 Cir. 1958) ("The decisions are plentiful that an appellate court cannot affirm a conviction erroneously secured on one theory, on the speculation that conviction would have followed if the correct theory had been applied."); *Samuel v. United States,* 169 F.2d 787, 792 (9 Cir. 1948) ("We think giving the wrong law in this case

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never had any opportunity at all to rebut a claim that the material exceeded San Diego standards, and petitioners plainly were denied any opportunity by the trial judge to present any evidence to establish that the material did not offend the standards of tolerance of the San Diego community.

was certainly not less prejudicial than omission to give the law at all."); *Little v. United States*, 73 F.2d 861, 866-867 (10 Cir. 1934) ("But where error occurs which, within the range of a reasonable possibility, may have affected the verdict of a jury, appellant is not required to explore the minds of the jurors in an effort to prove that it would in fact influence their verdict. So to hold would, as a practical matter, take from a defendant his right to a fair trial."). See also, *New York Times Co. v. Sullivan*, 376 U.S.254, 284; *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 11; *Chapman v. California*, 386 U.S.18, 22-24. As was stated by this Court in *Kotteakos v. United States*, 328 U.S.750, 776:

> "It may be, as the Court of Appeals found, that the evidence concerning each petitioner was so clear that conviction would have been dictated and reversal forbidden, if it had been presented in separate trials for each offense or in one or more substantially similar to the Berger trial in the number of conspiracies and conspirators involved. But whether so or not is neither our problem nor that of the Court of Appeals for this case. That conviction would, or might probably, have resulted in a properly conducted trial is not the criterion of § 269."

Petitioners therefore earnestly urge the Court to grant petitioners the opportunity of a new trial with respect to this basic issue. This Court emphasized again and again in the *Miller* quintet that the accused in federal and state obscenity prosecutions must look to the jury for determination of all the essential "questions of fact", and that the jury must be permitted to draw "on the standards of their community" and not on an al-

leged unrealistic or abstract conception of national standards. In *Hamling* and in *Jenkins*, this Court has emphasized the importance of a jury decision based upon the jurors' knowledge of the community or vicinage from which they come. In *Miller*, this Court acknowledged that the extent of toleration in a single city in the State of Nevada or in the State of New York might be greater than the standards of other particular States or, indeed, the nation. The majority opinion's discussion of the justification for invoking varying community standards in the various federal judicial districts throughout the country is bottomed upon the fact that the standards of these particular communities may turn out to be either more tolerant or less tolerant than the standards of the nation as a whole. It appears plain, it is submitted, that such a substantial question as the evaluation of the extent of community toleration cannot be answered by the guess and conjecture of the judges of an appellate court without any basis for such conclusion other than their subjective judgment. See, *Miller v. California*, 413 U.S.15, fn.3.

The petitioners were tried on the basis of a charge and single theory which focused on the issue of national standards from the beginning to the end of the trial. Efforts to put in evidence with respect to the tolerance of the community from which the jurors were drawn were specifically thwarted by the trial judge. Clearly, had this case been tried under an indictment and a theory charging only violation of the community standards of San Diego, petitioners' presentation of expert witnesses, of documentary evidence, their requests for instructions, and the arguments of their counsel to the jury, would have been entirely different. Obviously, the instructions by the trial judge to the jury, and the

ultimate deliberations by the jury under such instructions, would also have been qualitatively different.

Moreover, the only government witness offered on community standards was the witness Getlein, who plainly on the record had no knowledge or expertise at all with respect to the standards of San Diego [R.T. 2306, 2307-2308, 2319, 2341-2342, 2448, 2451, 2696, 2797-2798]. Thus, the record is devoid of any evidence to affirmatively establish that the standards of San Diego were in any way violated by these petitioners, coupled with the denial of any opportunity for the petitioners to prove that the standards of tolerance of San Diego were not offended by the contents of the brochure.

In short, the verdict in the case herein might very well have been not guilty instead of guilty if the charge under the indictment and the trial of these petitioners had been conducted under proper legal standards and procedures. If all of this does not rise to constitutional error, clearly the judgments of conviction here cannot be said to have been fairly obtained or consistent with "civilized standards of procedure" which underlie the express constitutional prohibitions against arbitrary deprivation of liberty without due process of law and the infliction of cruel and unusual punishment.

4. As a preliminary matter, the majority opinion in the case herein concluded that "any constitutional principle enunciated in *Miller* which would serve to benefit petitioners must be applied in their case" [Slip Op. 12]. It is submitted, however, that while petitioners were assured by the majority opinion that they would receive the benefits of *Miller*, the fact is that they have received none. For example, with respect to the question of whether 18 U.S.C. §1461 was unconstitutionally

vague as applied to petitioners in their prosecution, the majority opinion states that these petitioners have no grounds to complain because of a lack of a previous limiting construction in the light of the brochure here involved. Yet, *Miller* expressly stated that "*no one will be subject to prosecution*" unless material depicts "hard core" sexual conduct "specifically defined by the regulating state law, as written or construed". If the federal obscenity statute at the time of the prosecutions herein did not contain the specific language enunciated in *Miller* and had not previously been construed by this Court to contain such language, then, it is submitted, petitioners were not only entitled to the benefits of "no prosecutions" guaranteed by *Miller*, but have the standing to challenge the validity of the statute as did the petitioners in *Rabe v. Washington*, 405 U.S.313, and *Smith v. Goguen*, 94 S.Ct. 1242.

Moreover, the substantive discussion in the opinion with respect to the vagueness of 18 U.S.C. §1461 and the failure of due process notice in the prosecution of these petitioners appears untenable, it is submitted. The majority states that in *Roth*, 18 U.S.C. §1461 was held to provide ascertainable standards of guilt and therefore did not violate due process rights of the defendants. But *Roth*, and *Memoirs* thereafter, dealt only with community standards, prurient interest, and social value. In *Miller*, this Court rejected those standards as unworkable and ambiguous and held that obscenity statutes will be invalid unless the patently offensive sexual conduct is specifically defined by the law, "as written or construed". Since petitioners are to receive the benefits of *Miller*, it follows that the holding in *Roth* is not sufficient to sustain the federal statute. It must be demonstrated, according to the *Miller* ruling,

that the federal statute contains the specifically proscribed sexual conduct, or it must be demonstrated that the Court has authoritatively construed the federal statute to contain such language.

The majority opinion states that in *United States v. 12 200-ft. Reels of Film*, this Court indicated that it was "prepared to construe" the generic terms in the federal obscenity statute to be limited to the sort of specific "hard core" sexual conduct given as examples in *Miller* [Slip Op. 24]. The majority opinion states: "We *now* so construe the companion provision in 18 U.S.C. §1461, the statute under which this prosecution was brought." [Slip Op. 24] (Emphasis added). If the statute had not been so construed prior to June 24, 1974, then it appears clear that the majority opinion is incorrect in asserting that *Bouie v. City of Columbia*, 378 U.S.347, is not applicable here. In such a case, petitioners are confronted with an "unforeseeable and retroactive judicial expansion of narrow and precise statutory language" [Slip Op. 25-26].

The *ex post facto* application of the statute in this case cannot, it is submitted, be saved by the conclusion that the federal obscenity statute had prior to *Miller* been "authoritatively construed in a manner consistent with *Miller*" [Slip Op. 22]. Aside from the multifold per curiam reversals based on *Redrup*, every definitive majority opinion and judgment of this Court since *Roth*, and up to *Kois v. Wisconsin*, 408 U.S.229, held the books, magazines, films and other expression involved in those cases to be not obscene and entitled to constitutional protection.[3] It is submitted that it is

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[3]In *Ginzberg*, the Court assumed for purposes of argument that the material itself was not obscene.

anomalous to assert under such circumstances that the federal obscenity statute has previously been "authoritatively construed" to include the specific and detailed sexual conduct outlined in *Miller*. The quotation from the opinion of Mr. Justice Harlan in *Manual Enterprises, Inc. v. Day* [Slip Op. 22] can hardly be equated with the "specific prerequisites" in *Miller*. It should be noted that Mr. Justice Harlan emphasized in *Manual* that the relevant "community" in federal obscenity prosecutions, as distinguished from state, should be a "national standard" (370 U.S. at 488). Moreover, the portrayals in the magazines involved in *Manual* were held to be nonobscene, despite the candid portrayal of the genitals of nude male models (370 U.S. at 489, n.3). None of this would appear to justify a conclusion that *Manual* represents an "authoritative construction" of the federal statute akin to *Miller*. Nor is the *Miller* attempt to avoid the vagueness issue by insistence upon language of specific sexual conduct met by the assertion that such language in *Manual* as "unacceptable under current community *mores*", or "obnoxiously debasing portrayals of sex", is an equivalent construction. The fact is that the language in *Manual* is so vague and ambiguous, and so entirely inconsistent with the specific language detailed in *Miller*, that the federal statute could not be sustained under the very rulings of this Court. *Smith v. Goguen*, 94 S.Ct.1242; *Lewis v. New Orleans*, 94 S.Ct.970; *Plummer v. City of Columbus*, 94 S.Ct.17; *Gooding v. Wilson*, 405 U.S.518; *Papachristou v. City of Jacksonville*, 405 U.S. 156.

Finally, it should be noted that even if the federal obscenity statute had been authoritatively construed prior to *Miller* to include the specific sexual conduct

there described, the jury here was never instructed that the statute has been so construed. The only instructions to the jury were basically the *Memoirs* standards. It is fundamental that a jury must be instructed as to the applicable law involved if a jury verdict is to be deemed consistent with the requirements of due process. *Bollenbach v. United States*, 326 U.S.607; *Samuel v. United States*, 169 F.2d 787, 792 (9 Cir. 1948).

5. The majority opinion states that the *Memoirs* "social value" formulation was not rejected in *Miller* because of its vagueness, but merely to ease the burden of the prosecutor in obscenity prosecutions [Slip Op. 26]. The conclusion of the majority is that since *Miller* permits the imposition of a lesser burden on the prosecution on the issue of social value than did *Memoirs*, and since the jury convicted petitioners on the basis of an instruction based on *Memoirs*, petitioners can derive "no benefit from the revision of that test in *Miller*" [Slip Op. 26-27]. However, aside from the reiteration in *Miller* that the concepts of "social value" and "social importance" were ambiguous and rejected as a constitutional standard, it is submitted by petitioners that the majority opinion overlooks the more basic question involved in this phase of the test for judging obscenity. In *Roth*, this Court held that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance". In *Miller*, this underlying concept which had been the justification for excluding "obscenity" from the protection of the First Amendment was rejected. Instead, the Court in *Miller* justified the exclusion of alleged obscene material from constitutional protection upon the ground that such material does "not have serious literary, artistic, political, or sci-

entific value". If petitioners are to have all the benefits of *Miller*, then it is submitted that a jury in San Diego should have the first opportunity, by proper instructions, to determine whether or not the contents of this brochure, which was critical of the President for his rejection of the Commission Report, did not in fact have serious political value. It is neither logically or empirically correct to assert that the test of "utterly without social value" necessarily encompasses a test of "lacking serious literary, artistic, political, or scientific value". Indeed, a Justice of the United States Supreme Court has held, in effect, that the brochure here involved has serious political, literary and scientific value. See the dissenting opinion of Mr. Justice Douglas [Slip Op. 1-2]. A jury, properly instructed under appropriate standards, might agree.

In this connection, the majority concludes that the jury was not bound to accept the opinion of any expert whose testimony was introduced at the trial, and that the jury's determination that the brochure was obscene "was supported by the evidence and consistent with the *Memoirs* formulation of obscenity" [Slip Op. 10]. The majority opinion notes that the court of appeals also found that the evidence was sufficient under the *Roth-Memoirs* test [Slip Op. 7, fn. 7]. But the evidence which the court below and this Court find to be sufficient was based solely on "hypothetical" and "futile" standards. The only evidence offered on standards, for example, was on national standards, and the government's witness was not qualified to even testify with respect to the local standards of San Diego. Obviously, the court below could not know at the time it originally affirmed the judgments of conviction that the national standards and utterly without redeeming social

value tests were to be subsequently rejected in *Miller*. But if, as the majority states in the opinion here, petitioners are to be given all the benefits of *Miller*, then clearly the judgments of conviction are not supported by evidence presented to a jury with respect to elements of the offense which the majority now finds essential, to wit, lack of literary, artistic, political or scientific value and standards of the district from which the jury is drawn.

B

1. In the light of the foregoing, petitioners submit that considerations of fairness which underlie this Court's supervisory authority over the administration of criminal justice in the federal courts warrant reversal and remand in the case herein. There are, however, additional grounds for invoking this Court's supervisory jurisdiction. It appears that in some instances the record and the applicable law have been overlooked in the majority opinion, and in other instances it is conceded that additional errors occurred at the trial. The concession that there has been more than one error is of significance. It has been held that errors, when considered in toto, may accumulate such a cumulative prejudice that they require a reversal. *Gordon v. United States*, 344 U.S.414, 422-423; *Crawford v. United States*, 212 U.S.183; *Olender v. United States*, 210 F. 2d 795, 808-809 (9 Cir. 1954). Petitioners submit that fairness and justice require modification of the harsh judgments of conviction herein, not only based upon the foregoing analysis of the first subdivision of the majority opinion [Slip Op. 7-27], but also an analysis of the remainder of the discussion in the majority opinion.

The majority opinion sustains the sufficiency of the indictment based upon such decisions as *United States v. Carll*, 105 U.S.611, and *United States v. Hess*, 124 U.S.483, both of which cases held the indictments to be insufficient. *United States v. Russell*, 369 U.S.749, is distinguished because obscenity is "a legal term of art", and "is a term sufficiently definite in legal meaning to give a defendant notice of the charge against him" [Slip Op. 27-28]. In short, the use of the term "obscene" assumedly involves similar standards in an indictment under *Roth*, under *Memoirs*, under *Miller*, and under *Hamling*, and is purportedly sufficient to advise each of the accused under such circumstances of the charges made against him. Yet, in the trial herein, these petitioners were advised by a bill of particulars that the word "obscene" meant only that the brochure exceeded contemporary community standards in the nation as a whole, appealed to the prurient interest of the average person, and was utterly without redeeming social value or importance. These petitioners, who have been told by the majority opinion that they are entitled to the benefits of *Miller*, were never advised that the brochure exceeded the contemporary standards of San Diego; were never advised that the charge against them included a charge that the material was designed and intended to appeal to the prurient interest of a specifically defined deviant group; were never advised that the brochure lacked serious literary, artistic, political, or scientific value; and were never advised by statute, indictment or bill of particulars with respect to the specifically defined sexual conduct delineated in *Miller*.

If "the various component parts of the constitutional definition of obscenity need not be alleged in the indict-

ment" [Slip Op. 28-29], it must be remembered that in this case the bill of particulars of the indictment by the government did set forth the alleged essential elements of obscenity, and such elements were found in *Miller* to be hypothetical and futile. In this case, the government descended to the particular, and the particulars rendered the indictment patently defective under the rulings of this Court in *Miller*. In similar fashion, the District Court and the Court of Appeals may have upheld the sufficiency of the indictment [Slip Op. 29, fn. 12], but the indictment was only upheld on the basis of standards which this Court in *Miller* held to be unworkable and incapable of objective measurement. The sufficiency of the indictment here, therefore, is as much in question as the sufficiency of the indictment in *Orito*, which led to remand by the Court.

It is difficult to conclude that petitioners were "adequately" informed of the charges made against them. It is perhaps more accurate to say that petitioners were convicted on a charge never made and a theory never tried.

In *Grunewald v. United States*, 353 U.S.391, 404, it was stated: "Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." The obliteration by the majority opinion [Slip Op. 34] of the heavier requirement of proof of *scienter* in conspiracy prosecutions, as distinguished from alleged substantive violations, opens up avenues of prejudice to innocent defendants and is inconsistent with fair law enforcement. There is danger to all those engaged in the circulation of the

press when persons who combine to engage in normal business activities find their joint pursuits boosted into a federal conspiracy prosecution.

The majority opinion concedes that a defendant in an obscenity prosecution is entitled to adduce "relevant, competent evidence bearing on the issues to be tried" [Slip Op. 35]. It is stated, however, that "the availability of similar materials on the newsstands of the community does not automatically make them admissible" [Slip Op. 35]. The majority opinion appears to have overlooked that the evidence showed more than mere availability of the offered evidence. The fact is that the experts testified that the materials on the newsstands of the community found a reasonable degree of acceptance in the community [J.A. 166-167; R.T. 3577-3579; 3922-3947]. Although it is conceded that some of the materials offered by petitioners were "clearly relevant" [Slip Op. 37], still it is stated that the district court had the discretion to exclude such evidence on the ground that it would tend to create "more confusion than enlightenment in the minds of the jury" [Slip Op. 37]. There is nothing in the record to indicate how the admission of clearly relevant evidence in the case herein would have confused the jury, and the Court overlooks that all evidence other than that of the experts was excluded in toto as an alternative to the introduction of expert witnesses, and the statement made with respect to "confusion" was a mere general ground offered by the trial judge without any particularization (J.A. 157-158). That the trial judge "expressed willingness to permit the same material to be treated in the testimony of expert witnesses" [Slip Op. 37] overlooks the fact that the material which the experts were discussing before the jury was never shown

to the jury. On the one hand, the jury was instructed by the trial judge that they could disregard the testimony of the experts, and on the other hand, they were not permitted to see relevant evidence which might have led the jury to accept testimony of petitioners' experts. It should also be added that while the trial judge permitted "four expert witnesses called by petitioners to testify extensively concerning the relevant community standards" [Slip Op. 35], still the only relevant community standard which the trial judge permitted the experts to testify about was the national standard, abandoned in *Miller*.

On the issue of "prurient interest" [Slip Op. 37-39], the majority opinion appears to overlook the record in salient respects. These petitioners were never charged in the indictment with preparing a brochure "designed for and primarily disseminated to a clearly defined deviant sexual group". It was never charged that the brochure appealed to the prurient interest of some specifically defined deviant group. The government's bill of particulars specifically asserted that the charge in the indictment was only that the brochure herein allegedly appealed to the prurient interest of the average person (J.A. 45-46). The trial judge not only permitted evidence to come into the record in an attempt to establish that the brochure appealed to the prurient interest of sexually deviant groups, but also instructed the jury that on the one hand, the material must be measured "by its appeal to the average adult", but on the other hand, the prurient appeal requirement may be assessed "in terms of sexual interest of the intended or probable recipient group. This group must be a clearly defined sexual deviant group . . . I suppose one clearly defined would be homosexuals" (J.A. 239-240). In-

deed, the trial judge, preliminarily to the aforesaid statements, instructed the jury specifically that the appeal to prurient interest must be measured either by the average or ordinary adult "or by a clearly defined deviant group" (J.A. 239).

The majority opinion misconceives the question presented herein. The issue is not whether a general finding that material appeals to a prurient interest in sex is precluded when some of the material appeals to the prurient interest of the average person and some appeals to the prurient interest of sexual deviants [Slip Op. 38]. The fundamental issue here, which has not been answered by the majority opinion, is how the judgments of conviction can be sustained when the trial court permitted the jury to convict petitioners under a *Mishkin* standard, which was never charged in the indictment and specifically disavowed in the bill of particulars of the indictment, which was never established by evidence (since there was no evidence that these petitioners designed or intended the material for some deviant group), and which was given to the jury as an alternative standard for their consideration. The majority opinion states that the jury was instructed that the materials must appear generally to a prurient interest in sex, but overlooks that the jury was specifically instructed that they could return a verdict of guilt even if they intuited that the brochure appealed only to a deviant group. See, *Stromberg v. California,* 283 U.S.359, 367-368.

It should also be observed in this connection that the majority opinion concedes another error committed during the trial which adds to the total of cumulated errors in this case. It was conceded by the Court of

Appeals, and the majority opinion agrees, that the evidence offered with respect to the alleged prurient appeal to a sexually deviant group "was at variance with the Government's answer to the Bill of Particulars" [Slip Op. 37, fn. 17].

The majority opinion devotes considerable space to a discussion of Rule 30 of the Federal Rules of Criminal Procedure [Slip Op. 41-45]. The upshot of the discussion is marked by the opinion's conclusion that, "we agree with the Court of Appeals that the District Court erred in refusing to permit such objections to be made out of the presence of the jury" [Slip Op. 42]. Again, however, the Court concludes that such error is not material, and reversal is not required [Slip Op. 42]. While conceding that the ultimate way to assure the goal attempted by the 1966 amendment to Rule 30 "is to comply with the Rule" [Slip Op. 44], the majority opinion concludes that a strict approach requiring reversal would be unduly mechanical and "inconsistent with interpretation *in pari materia* of Rule 30 and other relevant provisions of the Federal Rules of Criminal Procedure" [Slip Op. 44-45]. Yet, only five years ago, this Court gave quite a different interpretation of another Rule of the Rules of Criminal Procedure, to wit, Rule 11, which governs the procedure for acceptance of guilty pleas in federal criminal trials. Rule 11 provides, among other things, that the court may not accept the plea without first addressing the defendant personally and determining that the plea is made voluntarily and with understanding of the nature of the charge and the consequences of the plea. In *McCarthy v. United States,* 394 U.S.459, the defendant had pleaded guilty to an indictment charging violations of the Internal Revenue Code. His counsel at the time of

the plea told the court that he had advised the defendant of the consequences of the plea. The court also asked the defendant whether he understood that his plea meant waiver of a jury trial and the possibility of a sentence of five years' imprisonment. Subsequent colloquies at the time of the sentencing hearing also demonstrated that the judge had satisfied himself by examination of the presentence report that the plea had a factual basis. Nevertheless, and despite all this, this Court reversed the judgment of the Court of Appeals and remanded the case to afford the petitioner an opportunity to plead once again, all of this because the court initially had not *first* addressed the defendant personally. This Court stated:

> "We thus conclude that *prejudice inheres* in a failure to comply with Rule 11, for noncompliance deprives the defendant of the Rule's procedural safeguards that are designed to facilitate a more accurate determination of the voluntariness of his plea. Our holding that a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew not only will insure that every accused is afforded those procedural safeguards, but also will help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the original record is inadequate." (394 U.S. at 471-472) (Emphasis added).

The majority opinion has declined to afford petitioners the shelter of Rule 30, despite the plain purpose of the 1966 amendment. The majority opinion finds "no

prejudice" to petitioners, apparently because the record does not indicate that the discussion was heard by the jury (nor does it indicate that it was not) and because the trial judge had indicated his rulings with respect to the instructions requested by counsel. As to the court's prior rulings, the record is plain that there was no satisfactory indication prior to the time of the giving of the instructions to the jury as to what the trial judge had decided. Many of the instructions remained unsettled [R.T. 4442-4443, 4457, 4471, 4479, 4487, 4492, 4495, 4502, 4504]. Moreover, the achievement of the objective of Rule 30 is in no way related to whether or not the jury hears counsel making his objections to the instructions of the judge. The amendment was intended to allow counsel for an accused full opportunity to object outside of the presence of the jury in order to avoid the concededly psychological pressures of low-toned bench conferences which lead to truncated presentations and understandings. Indeed, in *Schartner*, to which the majority opinion points, the court rejected the notion that failure to obey Rule 30 is "harmless" and stated that there should be reversal for noncompliance "even where the defendant cannot affirmatively prove prejudice" (426 F.2d at 479). Pressure upon jurors who view defense counsel in a posture of apparent antagonism toward a trial judge are clearly imperceptible, and it is always difficult for a criminal defendant to prove their presence. It is for this very reason that the amendment to Rule 30 was enacted.

Finally, regarding the selection of the trial jury, petitioners' claims with respect to the limitations on *voir dire* questions and the improper constitution of the jury were rejected [Slip Op. 46-50]. The Court, in the *Miller*, *Hamling* and *Jenkins* opinions, has placed great

stress on the importance of the jury in obscenity prosecutions. Yet, the attempt to obtain a jury which would at least be free of prejudice in this highly emotional area was effectively blocked by the trial judge during *voir dire*. The demands of due process may require not only inquiry by a judge into possible racial prejudices, but also with respect to deep and irrational prejudices against the depiction or representation of sex or nudity. Assuming, as the majority opinion does, that there is a cognizable class of citizens between the ages of 18 and 24, it does appear to be a manifest abuse of discretion not to have granted counsel a one-month extension to obtain a jury panel which would have at least contained the names of persons 21 years of age and over.

C.

Petitioners respectfully submit, in light of all the foregoing, that the petition for rehearing should be granted and the judgment of affirmance modified to provide for reversal and remand. Members of this Court have frequently stated that subjective aversion to the particular conduct of an accused should play no part in the determination of the constitutional and legal issues before the Court. As Mr. Justice Brandeis once stated, "we must be ever on our guard, lest we erect our prejudices into legal principles". Freund, *The Supreme Court of the United States,* 124 (Paperback ed. 1961). This Court has manifested its determination to place attachment to the Constitution above any purely personal attitudes by the repeated exercise of this Court's supervisory jurisdiction over the administration of criminal justice in the federal courts. Time and again this Court has insisted upon the unbiased and carefully delineated application of constitutional and legal principles, as

well as fairness in trial procedures. Justice must satisfy the appearance of justice if the community is to have faith and confidence in the law and our institutions.

Conclusion.

In *Miller, Paris Adult Thearte I, 12 200-ft. Reels, Orito* and *Kaplan,* all of these federal and state judgments were vacated and remanded. Since June 21, 1973, some seventy-five judgments have been vacated and remanded in the light of the original quintet of decisions. Moreover, virtually all of the aforesaid judgments imposed far lesser sanctions than the four and three year terms of imprisonment imposed in the case herein. Fairness would dictate, it is submitted, that under the circumstances of this case the petitioners should be afforded, as a minimum, the opportunity for a new trial based on the principles, definitions and procedures enunciated by this Court in *Miller* and *Hamling.*

For all the foregoing reasons, the Petition for Rehearing should be granted.

Respectfully submitted,

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Attorney for Petitioners William L. Hamling, Reed Enterprises, Inc. and Library Service, Inc.,

SAM ROSENWEIN,
Attorney for Petitioners Earl Kemp, Shirley R. Wright and David L. Thomas.

LOUIS S. KATZ,
Of Counsel.

Attorneys' Certificate of Good Faith.

The undersigned Stanley Fleishman, attorney for petitioners William L. Hamling, Reed Enterprises, Inc. and Library Service, Inc., hereby certifies that the petition for rehearing filed in this cause is presented in good faith, that in his judgment the grounds of said petition are well taken and in conformance with the Court's Rules, and that said petition for rehearing is not interposed for delay.

STANLEY FLEISHMAN,
Attorney for Petitioners William L. Hamling, Reed Enterprises, Inc. and Library Service, Inc.

The undersigned Sam Rosenwein, attorney for petitioners Earl Kemp, Shirley R. Wright and David L. Thomas, hereby certifies that the petition for rehearing filed in this cause is presented in good faith, that in his judgment the grounds of said petition are well taken and in conformance with the Court's Rules, and that said petition for rehearing is not interposed for delay.

SAM ROSENWEIN,
Attorney for Petitioners Earl Kemp, Shirley R. Wright and David L. Thomas.